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No. 370.

In the Supreme Court of the United States

OCTOBER TERM, 1955.

KANSAS CITY POWER & LIGHT COMPANY, *et al.*,

Petitioners,

vs.

DOUGLAS McKAY, Secretary of the Interior, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

Amendment of Opinion Below.

On September 23, 1955 the court below (Prettyman, J. not participating) entered an order further amending the majority opinion entered herein on April 28, 1955. A certified supplemental transcript of record containing a copy of said order is filed herewith and said amendment is printed in Appendix B hereto, *infra*, 20.

Statutes Involved.

If, as Respondents seemingly assert (Resp. Br. 19-20, 28), Section 2(g) of the APA* (5 U. S. C. 1001(g)) is

* In addition to the abbreviations used in the Petition (Pet. 2 fn.) the following abbreviations are also used in this brief:

Petition for writ of certiorari ---------- Pet.
Respondents' brief in opposition ---------- Resp. Br.
Senate Document No. 248, 79th Congress, 2d Session ---------- Sen. Doc. No. 248

one of the statutes here involved, then Section 2(f) of that Act (5 U. S. C. 1001(f)) is also involved. It is printed in Appendix A hereto, *infra*, 19.

Respondents' Misconception of Questions Presented.

Respondents seek to eliminate from the "Questions Presented" three of the four separate and independent grounds of Petitioners' right to be heard, each of which was passed on by the court below. (Resp. Br. 2, Pet. 2-3, Pet. App. B, 46-58.) Moreover, as hereinafter shown, Respondents' grossly incomplete statement of the "Questions Presented" is predicated upon factual assumptions which misconstrue or misstate the nature and scope of Petitioners' separate claims and the purpose of the action.

Respondents' Statement of the Case.

The gist of the separate claims alleged in the Complaint is summarized at pages 8-12 of the Petition; and Respondents do not point out any aspects in which they contend that that summary is inaccurate or omits any allegation of fact which is legally significant for the purpose of the pending Petition.

Respondents do not, and cannot, deny that the decision of the court below is based wholly upon the allegations of the Complaint. Nevertheless, Respondents' "Statement" consists almost wholly of factual assertions allegedly supported by record citations to findings and evidence in the district court. Among the numerous record citations contained in the text of Respondents' Statement only two (Resp. Br. 6) are to the Complaint. For the purpose of the pending Petition, it is neither necessary nor appropriate to point out the extent to which Respondents' factual assertions, allegedly supported by findings and evidence, are erroneous or so incomplete as to be grossly misleading.

However, see "Salient Facts Established by the Findings and Evidence." (Pet. 12-17.)*

The gist of the separate claims stated in the Complaint is that Respondents, the Super Co-ops and other persons unknown to Petitioners have entered into, and are threatening to carry out, a conspiracy, the necessary, intended and expressly required effect of which is to destroy Petitioners' respective businesses in large areas of their service territories. Among the means being utilized by the conspirators to carry out their conspiracy are misuse of federal funds and the making of systems of integrated and reciprocally conditioned contracts under color, but in violation, of the RE and Flood Control Acts. (Pet. 8-12.) The purpose of the action is to prevent the conspirators from carrying out their conspiracy.

The claims are not founded on, and the action is not brought for the purpose of enjoining, the systems of contracts, the unlawful expenditure of federal funds or the violations of the statutes by Respondents. Respondents' misuse of federal funds, violations of statutory and constitutional limitations upon their authority and execution

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* At the request of Defendants-Respondents, the district court adopted as findings of fact various general conclusions which are squarely contradicted and nullified by that court's findings of basic facts. *Davis v. Aetna Acceptance Co.*, 293 U. S. 328, 332; *Kuhn v. Princess Lida* (C. C. A. 3), 119 F. 2d 704, 705-6; *Pacific Portland Cement Co. v. Food, etc. Corp.* (C. C. A. 9), 178 F. 2d 541, 548; *Bach v. Friden Calculating Machine Co.* (C. C. A. 6), 155 F. 2d 361, 364; *J. S. Tyree, Chemist, Inc. v. Thymo Borine Laboratory* (C. C. A. 7), 151 F. 2d 621, 624; *Standard Oil Development Co. v. Marzall*, 86 App. D. C. 210, 181 F. 2d 280, 284. Illustratively, compare finding 23 (R. 163) with findings 12-13 (R. 158-9). Many of such conclusory findings are also either pure conclusions of law or rest upon errors of law. Others are contrary to the uncontradicted evidence. Many of Respondents' factual assertions are not supported by their record citations or are supported only by citations to the foregoing erroneous conclusory findings as will be fully shown if the Petition is granted.

of the systems of contracts are material only because they are among the unlawful means being utilized to carry out the conspiracy. The fact, that an incidental result of preventing the conspirators from carrying out their conspiracy will be to prevent Respondents' misuse of federal funds and to invalidate such systems of contracts, does not change the gravamen of the claims or convert the action into one to restrain the misuse of federal funds or to invalidate such systems of contracts.*

Nevertheless, Respondents seek to reduce (1) the case to a bare claim that Petitioners, as owners of nonexclusive franchises, will fortuitously suffer a "loss of business" and (2) the purpose of the action to preventing (a) REA from lending federal funds to Super Co-ops for constructing electric facilities and (b) SPA from using federal funds to purchase power and to lease transmission facilities. Respondents' assertions that the Complaint does not allege "a conspiracy to injure Petitioners" but merely a conspiracy of Respondents "to exceed their statutory author-

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* Respondents cryptically state that Petitioners' motion for preliminary injunction was never brought on for hearing. (Resp. Br. 5, fn. 2.) When said motion was filed, Respondents requested additional time for preparing and filing opposing papers; and Petitioners consented upon condition that said motion be set for early hearing on a day certain. Shortly prior to the date set for hearing on said motion, Respondents filed a motion for summary judgment supported by a voluminous brief and voluminous affidavits. Over Petitioners' objections, the court ordered that Respondents' motion for summary judgment be heard and determined in advance of Petitioners' motion for a temporary injunction. Thereupon, Petitioners, to avoid further delay, moved for discovery and to advance the case for trial and suggested that, to expedite the litigation, the case be specially assigned to one of the Judges in the district court in order to permit the case to be heard and determined before the Summer recess. The case was specially assigned but motions and pretrial proceedings and other commitments of the Judge prevented its trial before the Summer recess.

ity" and that, in any event, Petitioners abandoned the charge of conspiracy (Resp. Br. 6, 7, 13), are refuted *infra*, 6-10.

I. RESPONDENTS' ARGUMENT, THAT "UNDER ESTABLISHED GENERAL PRINCIPLES, PETITIONERS HAVE NO STANDING TO SUE," (Resp. Br. 9-12), IS INAPPOSITE.

Respondents curiously designate the four separate and independent grounds, upon which Petitioners throughout this litigation have claimed the right to be heard (Pet. 2-3), as "Special Claims to Standing." (Resp. Br. 12-22.) For some unexplained reason Respondents, before discussing such "Special Claims to Standing," purport to demonstrate that, if none of the grounds relied upon by Petitioners were involved, Petitioners would have no right to be heard. (Resp. Br. 9-12.) Respondents assert in substance that, upon this hypothetical assumption, Petitioners' right to be heard would be foreclosed by *Alabama Power Co. v. Ickes*, 302 U. S. 464 and *TEP Co. v. TVA*, 306 U. S. 118. In those cases the APA was not involved; the charges of conspiracy were dismissed solely for failure of proof; the complainants did not claim any statutory right or interest; and the pertinent States had specifically authorized TVA to engage in the electric utility business.

Petitioners have demonstrated that the foregoing decisions do not foreclose Petitioners' right to be heard upon any of the four separate grounds asserted by Petitioners but that, in so far as apposite, those cases support Petitioners' claims. (Pet. 23-5, 29-30.) Respondents do not answer, but instead ignore, that demonstration. Although this branch of Respondents' argument seems footless, it is significant, and typical of Respondents' brief, that the "REA loans" and the "SPA contracts" are discussed as though they were independent and unrelated transactions,

whereas they are indivisible and inseparable parts of a single scheme and none is effective unless all are effective and until each Super Co-op has obtained from all of its member distribution cooperatives, contracts binding them to cease patronizing Petitioners and to purchase their entire requirements from SPA for a period of 40 years. (Pet. 8-12; see also 12-17.)

II. RESPONDENTS' ARGUMENTS, THAT "SPECIAL CLAIMS TO STANDING ARE WITHOUT MERIT," ARE SEVERALLY WITHOUT SUBSTANCE.

A. Conspiracy. (Resp. Br. 12-15.)

1. *Allegation of Conspiracy*: For the first time in this litigation Respondents assert that the Complaint does not allege a conspiracy "calculated to destroy their (Petitioners') business," but only "a conspiracy to exceed statutory authority." (Resp. Br. 13, 6.)

> "Concert of action is a conspiracy if its object is unlawful *or* if the means used are unlawful." *Truax v. Corrigan*, 257 U. S. 312, 327.

The Complaint specifically alleges that the defendants and divers persons unknown to plaintiffs had conspired and acted in concert to formulate an unlawful plan (R. 35); that defendants and three named Super Co-ops (N. W.; Central; and Sho-Me), acting collectively and in concert, were engaging, or threatening to engage, in numerous overt acts in furtherance of the conspiracy (R. 37, 42); that, upon information and belief, defendants and additional Super Co-ops then unknown to plaintiffs were engaging, or threatening to engage, in similar overt acts in furtherance of the conspiracy (R. 48); and that the means being utilized to carry out the conspiracy are severally unlawful (R. 50). To contend that such allegations do not

sufficiently charge a conspiracy among Respondents-Defendants and the Super Co-ops is plainly untenable.*

While the Complaint alleges other elements of damage to Petitioners, it specifically alleges that one purpose and effect of the conspiracy is to require all of the distribution cooperatives, which are members of the Super Co-ops, to cease patronizing Plaintiffs and to purchase all of their electric requirements from SPA (R. 40, 46). The plain purpose and effect of the conspiracy is to destroy Petitioners' respective businesses in large areas of their service territories.** However, if the Complaint had alleged only that the purpose and effect of the conspiracy is to damage Petitioners (whether by competition or otherwise), it would state a claim upon which Petitioners have a right to be heard under the very cases upon which Respondents rely. (Pet. 24-5.)

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* As stated by Judge Prettyman in his dissenting opinion:

"While the complaint alleges the contemplated sets of contracts to be illegal in a number of respects, we need now notice only one. A principal thrust of the complaint is against concerted action, formalized by written agreement, of the Government officers and the Super Co-ops. The allegation is that a number of persons—suppliers and customers—confederated to deprive plaintiffs of their business by entering into agreements whereby all the customers of plaintiffs would transfer their patronage to a potential competitor. Technically in legal terms, such an agreement and concert of action is a conspiracy." (Pet. App. B, 61.)

** In his dissenting opinion Judge Prettyman also said:

"I think our plaintiffs show a case which gives them standing to sue. They allege not only that their business would be impaired by these contracts but that it would be wholly taken. * * *

"The court treats the contracts as merely setting up competition for the Companies. I do not see them that way. Allegedly these contracts would take all this business away from the Companies and give it to the Government. This would be a complete destruction by concerted action, not a mere establishment of competition. * * *" (Pet. App. B, 63-4.)

Respondents' alleged distinction between a conspiracy to injure Petitioners and a conspiracy to exceed statutory authority, is obscure and unexplained. (Resp. Br. 6, 13.) Seemingly the theory is that, although a third person will necessarily and knowingly be damaged by a concert of action, the concerted action is not a conspiracy unless the purpose, or a primary purpose, of the conspirators is to injure the third party. Where, as here, the means used are unlawful (and, were that material, the object is also unlawful), malice is not an essential element of conspiracy. Moreover, in the law of conspiracy malice does not consist of actual ill will but of lack of legal justification for inflicting the damage upon a third party; and the damage threatened to Petitioners is the inevitable, intended and known result of carrying out the conspiracy. *Stearns v. Lumber Co.*, (Mass.) 157 N. E. 82; *Fireproofing Co. v. Masons Ass'n.*, (C. C. A. 2) 169 Fed. 259; *Allis Chalmers Co. v. Union*, 150 Fed. 155, 172-3; *State v. Huegin* (Wis.), 85 N. W. 1046; *Motley Green & Co. v. Detroit Steel & Springs Co.*, 161 Fed. 389.

2. *Alleged waiver or abandonment of charge of conspiracy*: Although no such claim was made in the court below and its decision is based wholly on the Complaint, Respondents now contend that Petitioners have waived any right to rely upon the conspiracy alleged in the Complaint (Resp. Br. 14, 7). In the district court different judges overruled successive motions to dismiss the Complaint and for summary judgment upon the ground, among others, that Petitioners have no right to be heard. (R. 104-7, 109.) Thereafter, on Respondents' request and over Petitioners' objections, the district court ordered a separate trial on an issue designated as "the legality or illegality of said contracts" and further narrowed that issue in

its pretrial order. (R. 112, 121-5.) Manifestly, as Respondents concede (Resp. Br. 14), the limitations imposed by the district court upon the scope of the separate trial precluded the making or requesting of any finding as to conspiracy; and no finding upon that point was requested either by Respondents or Petitioners.

Since the district court had twice sustained Petitioners' right to be heard and the findings made and the evidence received on the separate trial clearly establishes the conspiracy alleged in the Complaint as a matter of law*, there was no need or occasion to request a further hearing upon, or to introduce further cumulative evidence in support of, Petitioners' right to be heard or the allegations of conspiracy. Petitioners were anxious to expedite final disposition of the case in the district court, which had been greatly delayed by the separate trial ordered over Petitioners' objections. However, Respondents refused to stipulate facts necessary to prove jurisdictional amount (without which final judgment could not be entered) unless Petitioners would file a motion for the entry of final judgment in the form entered by the court. (R. 193.) To avoid further delay Petitioners acceded to this demand. As appears on the face of this curious judgment, the district court had previously determined "the issues of jurisdictional amount, *standing to sue*, and the legality of the contracts" (R. 193); and Petitioners waived

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* At the hearing on the respective motions of Petitioners and Respondents for discovery, Respondents successfully argued that no further discovery should be permitted on the issue of conspiracy because the concerted action of Respondents and the Super Co-ops was fully shown by the systems of contracts theretofore produced. Manifestly, Petitioners have a right to support the decisions of the district court, that Petitioners have a right to be heard, upon any relevant ground, whether or not relied upon by that court.

only any right "to present additional evidence on any other issue." This contention of Respondents is plainly without substance.

B. Respondents' Argument Entitled "Special Statutory Interest." (Resp. Br. 15-18.)

As shown in the Petition, both the language and legislative history of the RE and Flood Contract Acts establish that many of the limitations imposed upon the authority granted to their Administrators, which Respondents are violating, were imposed by the Congress to protect privately owned utilities against special damage which would be caused by the prohibited acts; and under the decisions therein cited such statutes create a legally protectable interest in Petitioners. (Pet. 25-9.) Respondents do not challenge the accuracy of the review of the statutory language and legislative history of those Acts contained in the Petition or attempt to distinguish the decisions therein cited.

Instead, Respondents argue that the statutes should not be construed as conferring any statutory interest upon Petitioners because the statutes do not (1) confer such an interest in express terms or (2) directly and affirmatively regulate or impose restraints upon the manner in which Petitioners conduct their business or (3) specifically provide for hearing and judicial review. (Resp. Br. 15-6.) These arguments are plainly without substance, unsupported by any citation of authority and contrary to the decisions cited in the Petition (Pet. 28-9), to the cases cited *infra* 13, and to the Congressional declaration quoted *infra* 13-14. Manifestly, limitations upon grants of statutory authority do not automatically create a special statutory interest in any one and every one; but, where,

as here, the language and legislative history of statutes show that limitations imposed upon authority thereby granted were intended to protect particular classes, it is equally clear, under established principles, that such statutes do create a special statutory interest in such classes. (Pet. 25-9.)

Contrary to Respondents' assertion, Petitioners do not predicate standing in this aspect upon mere allegations that they are taxpayers and citizens and that Respondents have exceeded their statutory authority (Resp. Br. 17); and Respondents' argument *in terrorem* that acceptance of Petitioners' construction of these statutes would establish a right in any taxpayer or citizen to test the validity of any governmental action is a complete *non sequitur*. However, it may be noted that in *Massachusetts v. Mellon*, 262 U. S. 447, this Court did not hold that the taxpayer (Frothingham) had no right to maintain the action for lack of any legal interest but, instead, because the interest of a federal taxpayer in the moneys of the Treasury is so minute and indeterminable and so remote, fluctuating and uncertain, that it affords no basis for an appeal to the preventive power of a court of equity. (1. c. 487.) See *Doremus v. Board of Education*, 342 U. S. 429 at 434.

Respondents finally argue that, to the extent that the statutes set forth the circumstances in which their adminisrators may act, "they merely provide 'guideposts' " for administrative action. (Resp. Br. 17-8.) If this contention has any meaning, it is that where a congressional grant of administrative authority is conditioned upon the existence of prescribed facts and limited to a prescribed purpose, such contentions and limitations are merely "guideposts" which the administrative agent may disregard in his discretion. If that is the law, then administra-

tive agencies of the Congress are indeed a privileged class; and, contrary to the declaration of the Congress, the statutes "would in effect be blank checks drawn to the credit of some administrative officer or board." (Sen. Doc. No. 248 at 212, 275, quoted Pet. 19 footnote.) This argument is further refuted by other Congressional declarations.*

C. Respondents' Argument Entitled "The Administrative Procedure Act." (Resp. Br. 18-21.)

Contrary to Respondents' seeming assertion (Resp. Br. 18-19), the fact that the majority of the court below, after basing its decision of this point upon the erroneous reasoning stated in the Petition (Pet. 18), stated that it was not unmindful of (although it did not apply) the principles declared by this Court (Pet. App. B, 55-6), in no way cures its erroneous construction of the Act. Respondents make no attempt to reconcile the decision with the language and legislative history of the Act or with the applicable principles declared by this Court. (See Pet. 18-23.)

Respondents argue that Petitioners are not adversely affected or aggrieved because the agency action does not directly regulate, or impose an obligation or sanction upon, or deny relief to, or fix the status of, Petitioners. (Resp. Br. 19, 21, 16.) The agency action expressly requires the distribution cooperatives, which are members of the Super Co-ops, to cease patronizing Petitioners and to buy their

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* "The statutes of Congress are not merely advisory when they relate to administrative agencies, any more, than in other cases." Sen. Doc. No. 248 at 275.

"There have been much misunderstanding and confusion of terms respecting the discretion of agencies. * * * They may not take affirmative or negative action without the factual basis required by the laws under which they are proceeding." Sen. Doc. No. 248 at 368-9.

entire electric requirements from SPA for a period of 40 years and thereby threatens destruction of Petitioners' businesses in large areas of their service territories. Respondents' argument is squarely refuted by numerous decisions of this Court. E.g., *Columbia Broadcasting System v. United States*, 316 U. S. 407, 422-3; *Pierce v. Society of Sisters*, 268 U. S. 510, 535; *Truax v. Raich*, 239 U. S. 33, 38-9; *Buchanan v. Warley*, 245 U. S. 60, 73; *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382, 390; *Alton RR. Co. v. United States*, 315 U. S. 15, 18-20; *FCC v. Sanders Radio Station*, 309 U. S. 470, 476, 477. It is also refuted by numerous decisions of federal courts of appeals. *A. E. Staley Mfg. Co. v. Secretary of Agriculture* (C. C. A. 7), 120 F. 2d 258, 259-60; *Land-O-Lakes Creameries v. McNutt* (C. C. A. 8), 132 F. 2d 653, 657-8; *B. F. Goodrich Co. v. Federal Trade Comm.* (App. D. C.), 208 F. 2d 829, 833-4; *National Coal Ass'n. v. F. P. C.* (App. D. C.), 191 F. 2d 462, 465-6.

Although asserting that the court did not hold that the right to judicial review under the APA depends upon an express grant of such a right (Resp. Br. 18-9), Respondents argue that "it is decisive that the statutes involved do not in terms" create any substantive rights, or right of judicial review or require "conventional" administrative hearings. (Resp. Br. 20.) The fact that the statutes do not in express terms create a legal interest is immaterial. (Pet. 28.) The Congress has explicitly declared that the absence of an express provision for judicial review is completely immaterial. (Pet. 19 fn.)

The Congress has also declared:

> "Where there is no statutory administrative hearing to which review is confined, the facts pertinent to any relevant question of law must, of course, be

tried and determined *de novo* by the reviewing court." (Sen. Doc. No. 248 at 370.)

See *Cates v. Haderlein*, 342 U. S. 804 reversing 189 F. 2d 369 (C. C. A. 7).

Respondents profess doubt as to whether (1) the administrative action here involved constitutes "agency action" or (2) if "agency action," it is not committed to agency discretion and therefore exempt from judicial review. (Resp. Br. 19, 20.) If the construction of the Act in these respects is doubtful, then those doubts should be settled by this Court.

However, Section 2(g) defines "agency action" to include, among other things, every agency "sanction, relief, or the equivalent or denial thereof." (Resp. Br., App. A 28.) Section 2(f) defines "sanction" to include every "requirement, limitation or other condition affecting the freedom of any person" and "destruction * * * of property" and defines "relief" to include "any agency grant of money, assistance, * * * privilege, or remedy" and the "taking of any other action upon the application or petition of, and beneficial to, any person." (App. A, *infra* 19.) The Congress expressly declared that the foregoing terms were "meant to be all embracing" and that the definition of the term "agency action" brings together and includes terms theretofore defined in order to simplify the judicial review provisions of Section 10 and to "assure the complete coverage of every form of agency power, proceeding, action, or inaction." Sen. Doc. No. 248 at 198, 255, 356. Clearly, the agency action here involved constitutes both "sanction" and "relief." *Supra* 3, 6, 7, 12-13.

Respondents further argue that the necessity for the administrators of the RE and Flood Control Acts to obtain annual appropriations from the Congress in some way pre-

cludes judicial review. With few, if any, exceptions, every administrative agency must obtain annual appropriations to defray the cost of performing its functions; and if that circumstance precluded judicial review, then the years of labor devoted by the Congress to framing and adopting the APA were wasted.*

The cryptic assertion in the majority opinion and in Respondents' brief, that Petitioners are not "adversely affected or aggrieved * * * *within the meaning of any relevant statute,*" is neither explained nor substantiated. (Resp. Br. 21, Pet. App. B 54.) While the meaning of the term "any relevant statute" in Section 10(a) is undoubtedly broader, it clearly includes any statute under which challenged agency action is taken. Pet. 22; *Heikkila v. Barber*, 345 U. S. 229; *Shaughnessy v. Pedreiro*, 349 U. S. 48; *United States v. Carusi* (C. C. A. 3), 166 F. 2d 457, 460; *Kristensen v. McGrath*, 86 App. D. C. 48, 179 F. 2d 796, 799, 800, aff'd. 340 U. S. 162. That Petitioners are threatened with direct and special damage by the agency action taken under the RE and Flood Control Acts, cannot be denied and is conceded. Inescapably, Petitioners are adversely affected within the principle laid down by this Court in *FCC v. Sanders Radio Station*, 309 U. S. 470, 476-7 and similar cases. (Pet. 20.)

An assumption, that this cryptic assertion is predicated upon the majority's conclusions that the RE and Flood Control Acts create no substantive statutory interest in Petitioners, that Petitioners have no right to be heard upon the charge of conspiracy in the Complaint and that Petitioners have no standing to protect their property

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* As stated in *Hotch v. United States* (C. C. A. 9), 212 F. 2d 280, the APA "must be read as a part of every delegation of authority unless specifically excepted." (l. c. 283.)

rights in nonexclusive franchises against invasion by defendants *acting as private individuals* and not in their official capacity, would not support the assertion even if such conclusions were not severally erroneous. Under each of the three foregoing independent grounds of Petitioners' right to be heard, Petitioners assert a substantive right which they can protect independently of the APA. However, where, as in the APA, the Congress has authorized persons adversely affected by agency action to invoke a judicial review, their right so to do is not dependent upon their possession of a substantive legal right; and it is sufficient if the agency action is causing or threatening to cause direct and special damage to them. (Pet. 20-1.)

The argument that Petitioners are not sustaining legal wrong within the meaning of Section 10(a), rests not only upon the Court's erroneous decision of the three independent grounds of Petitioners' right to be heard, but also upon a misinterpretation of the term "legal wrong" as used in the Act. Legislative history shows that the term "legal wrong," as used in the Act, has a broader scope than the term "*injuria*" under prior judicial decisions. (Pet. 21.)

D. Respondents' Argument Entitled "Nonexclusive Franchises." (Resp. Br. 21-2.)

Respondents again attempt to segregate the REA and SPA contracts and treat them as though they were wholly unrelated to each other and to the contracts requiring the distribution cooperatives to cease patronizing Petitioners and to purchase their entire requirements from SPA. In this argument Respondents assume that the activities of REA are limited to the lending of money although the assumption is contrary to the explicit allegations of the

Complaint and to the facts established by the findings and evidence. (Pet. 8-17.)

Respondents quote a statement from the opinion in *TEP Co. v. TVA*, 306 U. S. 118, to the effect that the privately owned utilities had "no vested right" to the maintenance of a State policy requiring a nonexclusive franchise for engaging in the electric utility business. In that case the States involved had, by statute, expressly authorized TVA to engage in the electric utility business without obtaining a nonexclusive franchise (Pet. 30); and the quoted language merely means that, since the exemption of TVA from such a requirement did not involve an unreasonable classification under the Fourteenth Amendment, the utilities could not complain. Missouri and Kansas have not exempted SPA from the statutory policy of those States; and the quoted language is wholly inapplicable to the case at bar.

III. GREAT PUBLIC IMPORTANCE OF QUESTIONS PRESENTED AND OF THEIR PROMPT SETTLEMENT.

Petitioners have shown the great public importance of the questions presented and of their prompt settlement by this Court. (Pet. 31-2.) Nowhere in their brief do Respondents question or challenge Petitioners' showing in either respect.

CONCLUSION.

For the reasons stated in the Petition for a writ of certiorari and in this brief, the Petition should be granted.

Respectfully submitted,

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October 12, 1955.

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APPENDIX A.

SECTION 2(f) OF THE ADMINISTRATIVE PROCEDURE ACT:

"Sanction and relief.

"(f) 'Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. 'Relief' includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person." Act of June 11, 1946, c. 324, § 2(f), 60 Stat. 237; U. S. C. A., Title 5, § 1001(f).

APPENDIX B.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DATED SEPTEMBER 23, 1955, FURTHER AMENDING ITS OPINION DATED APRIL 28, 1955.

Before: Prettyman, Bazelon and Washington, Circuit Judges, in Chambers.

ORDER.

It is ORDERED by the Court that the opinion of this Court entered herein April 28, 1955, be, and it is hereby, amended by adding the following after the sentence ending in the second line of Page 15: *

> "Plaintiffs-appellants cite and rely on the view expressed in *American President Lines v. Federal Maritime Board*, 112 F. Supp. 346, at 349 (D. C. D. C. 1953), which would in effect delete from Section 10(a) the phrase 'within the meaning of any relevant statute.' That view cannot, of course, be accepted."

and by adding to footnote 18 on Page 17** the following: Friend v. Lee, ____ U. S. App. D. C. ____, 221 F. 2d 96 (1955), so that said footnote as amended will read as follows:

> "Embassy Dairy v. Camalier, 93 U. S. App. D. C. 364, 211 F. 2d 41 (1954); Friend v. Lee, ____ U. S. App. D. C. ____, 221 F. 2d 96 (1955)."

Per Curiam.

Dated: September 23, 1955

Circuit Judge Prettyman did not participate in the foregoing order.

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* Page references in the above order are to the official slip opinion print. (R. 653-77.) The above reference is to the last sentence appearing on page 54 of Appendix B to the Petition for Certiorari.

** Footnote 18 (R. 669) appears on page 57 of Appendix B to the Petition for Certiorari.